

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

January 27, 2009

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No. 08-40542  
USDC No. 7:08-CR-37-ALL  
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Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JUAN RICARDO GALVAN-RODRIGUEZ

Defendant-Appellant

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 7:08-CR-37  
\_\_\_\_\_

Before JOLLY, BENAVIDES, and HAYNES, Circuit Judges.

PER CURIAM:\*

The Federal Public Defender appointed to represent Juan Ricardo Galvan-Rodriguez has moved for leave to withdraw and has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967). Galvan-Rodriguez has filed a response. An independent review of the record and counsel's brief reveals a potentially nonfrivolous issue for appeal, specifically, whether the case should be remanded for correction of the judgment in light of a discrepancy between the oral pronouncement of sentence and the written judgment. At sentencing, the district court stated that it would recommend that Galvan-Rodriguez's 77-month

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\*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentence run concurrently with any sentence that Galvan-Rodriguez was facing. However, the district court did not include this recommendation in its written judgment.

Counsel acknowledges the discrepancy between the oral pronouncement of sentence and the written judgment, but counsel asserts that the issue does not constitute reversible plain error. Although normally issues raised for the first time on appeal are reviewable only for plain error, review of the issue is not necessarily limited to plain error because Galvan-Rodriguez did not have the opportunity to object to the written judgment at sentencing. See *United States v. Bigelow*, 462 F.3d 378, 381 (5th Cir. 2006); see also *United States v. Vega*, 332 F.3d 849, 851 n.1 (5th Cir. 2003).

“In this Circuit, it is well settled law that where there is any variation between the oral and written pronouncements of sentence, the oral sentence prevails.” *United States v. Shaw*, [920 F.2d 1225, 1231](#) (5th Cir.1991). Ordinarily, when there is a discrepancy between the oral pronouncement of sentence and the written judgment, the case is remanded to have the district court amend the written judgment to conform to its oral judgment at sentencing. See *United States v. Martinez*, [250 F.3d 941, 942](#) (5th Cir. 2001). Notwithstanding that the oral pronouncement prevails and Galvan-Rodriguez did not receive the benefit of the concurrent sentence recommendation, counsel contends that no reversible plain error occurred here. Counsel’s one-paragraph argument does not convince us that a nonfrivolous issue is not presented here. Given that our precedent holds that oral pronouncements prevail, we find that there is a nonfrivolous issue for appeal. We view counsel’s argument more akin to a harmless error argument as opposed to a nonfrivolous analysis.

Accordingly, we DENY the motion to withdraw and in the interest of efficiency REMAND to the district court with instructions to correct the judgment with respect to the court’s oral pronouncement and have the district court clerk file the corrected judgment with the clerk of this court. We retain

jurisdiction, and upon the district court's compliance, appointed counsel shall be able to file a new appellate brief or file a new Anders brief such as the case warrants. Also, Galvan-Rodriguez's response shall remain on file with respect to any new appellant's brief or Anders brief that might be filed.